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**IN THE UNITED STATES DISTRICT COURT, CENTRAL DIVISION**
**DISTRICT OF UTAH**

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| UNIVERSITY OF UTAH, a body corporate and politic under Utah law, and J. BERNARD MACHEN, President of the University of Utah, | : | **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS** |
| Plaintiffs, | : | |
| v. | : | |
| MARK L. SHURTLEFF, Utah Attorney General, | : | Case No. 2:02-CV-0212-K |
| Defendant. | : | Judge Dale A. Kimball |

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS - Continued**



**TABLE OF AUTHORITIES**

**CASES**

**TABLE OF AUTHORITIES - Cases Continued**

**TABLE OF AUTHORITIES - Cases Continued**

## TABLE OF AUTHORITIES

### CONSTITUTIONS, STATUTES & RULES



### MISCELLANEOUS

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Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, defendant moves this Court to dismiss for lack of jurisdiction because: the plaintiffs do not have standing to bring this action, no case or controversy has been established between the parties, and this Court is without jurisdiction to consider the plaintiffs' state law claim. Defendant asks this Court to dismiss this action with prejudice on the grounds that no affirmative link has been alleged or shown between Attorney General Mark L. Shurtleff and any violation of the federal rights of the plaintiffs. Further, the plaintiffs have failed to state a claim of violation of any right of theirs protected by the First

Amendment to the United States Constitution. Finally, defendant asks this Court to dismiss the plaintiff's state law claims, as a matter of Utah law, on the merits.

## STATEMENT OF UNDISPUTED RELEVANT FACTS

### A. As to the University of Utah

1. The University of Utah began as the University of the State of Deseret. It was created by the General Assembly of the State of Deseret (Territorial Legislature of Utah) by an ordinance approved on February 28, 1850. 1851 Laws and Ordinances of the State of Deseret (Utah) 93-95. A copy is attached as Exhibit A.

2. Control over the University was given to a Chancellor and twelve Regents who were "chosen by the joint vote of both Houses of the General Assembly." Id. at 93.

3. Its name was not changed to the University of Utah until 1892. 1892 Utah Laws 8-11. A copy is attached as Exhibit B.

4. Along with changing the name of the University, the 1892 law also stated that the University of Utah "shall be deemed a public corporation and be subject to the laws of Utah, from time to time enacted, relating to its purposes and government." Id. at 8.

5. In 1898, this provision was amended to read that the University of Utah "shall be deemed a public corporation and shall be subject to the laws of this state, existent or hereafter enacted, relating to its purposes and government." Revised Statutes of Utah § 2291 (1898). A copy of excerpts of the Revised Statutes of Utah (1898) are attached as Exhibit C.

6. The Board of Regents of the University of Utah had the "power to enact by-laws and regulations for all concerns of the institution, **not inconsistent with the laws of the state.**" Revised Statutes of Utah § 2295 (1898) (emphasis added).

7. At the time of statehood, the governing board of the University of Utah was appointed by the governor with the advice and consent of Utah's senate. Revised Statutes of Utah § 2064 (1898).

8. Utah's Enabling Act provided a land grant for the already existing University of Utah (28 Stat. 107, § 8 (1894)) but also expressly provided that the "university provided for in this Act shall forever remain under the exclusive control of said State." 28 Stat. 107, § 11 (1894).

9. Utah's constitution called for all of the institutions and property of the Territory of Utah to become "the institutions and property of the State of Utah" upon its adoption. Proceedings Constitutional Convention 1895 at 1878. A copy of excerpts from the Proceedings of the Constitutional Convention of 1895 are attached as Exhibit D.

10. Utah's original constitution did not create or confer any new powers or authority to the University of Utah, but rather stated that:

> The location and establishment by existing laws of the University of Utah, and the Agricultural College [Utah State University] are hereby confirmed, and all the rights, immunities, franchises and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College respectively.

Utah Const. art. X, § 4 (1896); Proceedings Constitutional Convention 1895 at 1871.

11. The debate on this section makes it clear that the provision was meant to mandate the continued existence of the college and university as two separate institutions of higher education,

one located in Salt Lake City and the other in Logan. Proceedings Constitutional Convention 1895 at 1304-11, 1362-63.

12. Article X, Section Four of Utah's Constitution remained unchanged until 1986. In that year, the current version of the section was proposed and adopted.

> The general control and supervision of the higher education system shall be provided for by statute. All rights, immunities, franchises, and endowments originally established or recognized by the constitution for any public university or college are confirmed.

Utah Const. art. X, § 4 (1986).

13. The University of Utah prohibits its students and employees from possessing or using a firearm on University premises. It also prohibits its employees from possessing or using a firearm while conducting University business off campus. These policies contain an exemption only for those expressly authorized by the University to carry a firearm. Complaint at 5 ¶¶ 13-16.

**B. As to Attorney General Mark L. Shurtleff**

14. Mark L. Shurtleff is the duly elected Attorney General of the State of Utah. Complaint at 3 ¶ 7.

15. Among his duties is the constitutional one to be the legal advisor to Utah's state officers. Utah Const. art. VII, § 16.

16. By statute, Attorney General Shurtleff has the responsibility to "give the attorney general's opinion in writing and without fee to the Legislature or either house, and to any state officer, board, or commission, and to any county attorney or district attorney, when required, upon any question of law relating to their respective offices." Utah Code Ann. § 67-5-1(7) (2000).

17. A formal opinion of the Attorney General, given pursuant to this statute, "constitutes the Attorney General's carefully, considered judgment as to what the law requires in the circumstances presented" but it "has no legal binding effect on the requesting officer." Attorney General Policy Manual §5.10(D)(2) (a copy of this section of the Manual is attached as Exhibit E).

18. On October 26, 2001, the President of Utah's Senate and the Speaker of its House of Representatives requested a formal opinion from Attorney General Shurtleff as to the validity under Utah law of Utah's Department of Human Resource Management's (DHRM) Rule 477-9-1(5) (prohibiting state employees from carrying firearms "in any facility owned or operated by the state, or in any state vehicle, or at any time or any place while on state business."). On November 30, 2001, Attorney General Shurtleff responded by issuing Utah Attorney General's Opinion No. 01-002. Complaint at 7-8 ¶ 24; Utah Attorney General's Opinion No. 01-002, copy attached as Exhibit F.

19. Attorney General Shurtleff's opinion found the questioned DHRM rule to be unenforceable. Id.

20. In a footnote to his opinion, Attorney General Shurtleff stated:

> The administrative rule that is the subject of your inquiry, R. 477-9-1(5) may not be the only rule that has been promulgated without authorization from the Legislature. For instance, your letter requesting this opinion had as an attachment, Formal Opinion No. 98-01 from the Office of Legislative Research and General Counsel. That opinion concludes that the University of Utah's policy prohibiting students and faculty from possessing firearms on University premises was contrary to law. [As of this date, those policies are still listed in the University of Utah Policy and Procedures Manual: Policy 8-10, Rev. 3, July 14, 1997 and Policy 2-9, Rev. 7, July 13, 1998 Section IV Subsection F.] I agree with the reasoning and conclusions of the Legislative General Counsel that those policies are unlawful and in violation of the laws of this State.

Utah Attorney General's Opinion No. 01-002 at 4 n.13.

21. Other than the issuance of Opinion No. 01-002, the complaint contains no other allegations of actions or conduct on the part of Attorney General Shurtleff. Complaint at 2 ¶ 3 ("The University and President Machen have brought this action against the Attorney General because the latter recently issued a formal public opinion that the University lacks lawful authority to prohibit the use or possession of firearms on University premises."). See also Complaint at 7-8 ¶¶ 23-25.

22. The only other factual allegations concerning Attorney General Shurtleff deal with claims as to the "beliefs" held by the defendant. "The Attorney General believes that the University lacks authority to regulate use or possession of firearms on campus." Complaint at 13 ¶ 39(a). "The Attorney General believes and has publicly announced that the Firearms Act preempts the University's adoption and enforcement of any policy respecting firearms." Complaint at 13 ¶ 39(b). "The Attorney General believes that the Concealed Weapons Act compels the University to allow concealed weapons on campus." Complaint at 14 ¶ 39(c).

23. While the plaintiffs seek injunctive relief to prevent Attorney General Shurtleff from imposing civil and criminal liability, there are no factual allegations made in their complaint concerning what civil or criminal liability the defendant may have sought to impose. Indeed, there is no factual allegation concerning any threat of such conduct by the defendant, nor is there any explanation of what this liability might consist of. Complaint at 3 ¶ 5, 14-15 ¶ 41.

**C. Alleged Conduct of Non-Parties to this Action**

24. Rather than alleging conduct on the part of the defendant that has jeopardized the rights claimed by the plaintiffs, the complaint instead contains factual allegations concerning purported conduct on the part of third persons and not Attorney General Shurtleff.

25. Plaintiffs allege that "[s]tudents and members of the University's staff have threatened to bring firearms to campus." Complaint at 2 ¶ 3

26. That "certain members of the Utah Legislature threatened to reduce the University's administrative budget by up to 50 percent." Id., Complaint at 9 ¶ 27(b).

27. That the Utah State Legislature enacted Senate Bill 170, reauthorizing administrative rules, which expressly stated that it was not reauthorizing the University of Utah's internal university firearms policy. Complaint at 8-9 ¶ 27(a).

28. Plaintiffs allege that some students have expressed "their desire to carry firearms on campus" and some law students have formed an organization ("College of Law Gun Rights Advocates") and contend that the plaintiffs' policies are illegal. Complaint at 9 ¶ 28.

29. One student wrote a letter to a newspaper calling the plaintiffs' policies illegal and "urging students who owned concealed weapons to carry them." Complaint at 10 ¶ 30.

30. They also allege that some employees of the University have threatened to bring firearms onto the University campus contending that the plaintiffs' policies are illegal and unenforceable. Complaint at 9-10 ¶ 29.

**STANDARD FOR CONSIDERATION**

A trial court's decision as to whether or not it has subject matter jurisdiction is a question of law. Elephant Butte Irrigation Dist. v. Dep't of Interior, 160 F.3d 602, 607 (10th Cir. 1998). A

decision on a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) is considered under the same standard of review applicable to a Rule 12(b)(6) motion. "We accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff. Generally, the complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Ramirez v. Dep't of Corrs., 222 F.3d 1238, 1240 (10th Cir. 2000) (citation omitted).

## SUMMARY OF ARGUMENT

As well as a claim under 42 U.S.C. § 1983, the University of Utah and its president ask this Court to resolve an alleged dispute of Utah law between the university and Utah's Attorney General. This Court is without authority to hear this claim. Federal courts are without jurisdiction to consider claims that a state officer has violated, or refuses to follow, state law.

Nor does this Court have jurisdiction to consider the plaintiffs' federal claims. These claims are brought under the First Amendment as it is made applicable to the states by the Fourteenth Amendment. But long standing precedent prohibits a state created entity, such as the University of Utah, from bringing claims under the Fourteenth Amendment against the state and its officers.

The plaintiffs do not have standing to bring this action. The only action that Attorney General Shurtleff is alleged to have performed is the issuance of a non-binding opinion to the leadership of the Utah Legislature. Otherwise, the challenged conduct of the defendant is that he has beliefs as to what the law of Utah is. The plaintiffs have made no showing that they have suffered any concrete and particularized injury at the hands of the defendant. There is no causal connection between Attorney General Shurtleff and the complained of actions of third persons not

before the Court. Further, no relief granted against the defendant would be likely to redress the concerns of the plaintiffs. For these further reasons, the Court is without jurisdiction over the plaintiffs' complaint.

Plaintiffs complain of the conduct of students, employees of the University of Utah and state legislators. No affirmative link has been pled between the conduct of these independent persons and the defendant. That the defendant has an opinion on what the law of Utah is that is opposed to the beliefs of the plaintiffs fails to establish the necessary link between Attorney General Shurtleff and the complained of conduct of others. Nor does the University of Utah have any First Amendment rights that could be violated by the defendant. For these reasons the plaintiffs' federal claims should be dismissed due to their failure to state a claim for relief against the defendant.

Plaintiffs' state law claims should also be dismissed for failure to state a claim for relief. The University of Utah and President Machen claim that the university is independent and autonomous of state control as a matter of state law. This claim has been repeatedly rejected by the Utah Supreme Court for over ninety years. This Court and the United States Circuit Court of Appeals for the Tenth Circuit have also recognized that the University of Utah is subject to the control of the state and its legislature. Utah's legislature has retained for itself the power to regulate firearms and expressly prohibited political subdivisions and state entities from enacting any rules pertaining to firearms without first receiving specific authorization from the legislature. The University of Utah has not received any such specific authorization. Its firearms policies are therefore invalid as a matter of state law.

## ARGUMENT

The University of Utah and President Machen state two causes of action in their complaint. First, they claim that their first amendment rights have or will be violated, as made applicable to the state by the fourteenth amendment. This claim is alleged to be brought under "the terms of 42 U.S.C. § 1983." Complaint at 3, ¶ 6. Second they claim that the University's state constitutional right to govern itself independent of the Utah Legislature has also been violated. For the following reasons, Attorney General Shurtleff asks this Court to dismiss this matter for lack of jurisdiction, and on the merits.

Plaintiffs have failed to identify if they are suing Attorney General Shurtleff in his official capacity or in his personal capacity. An official capacity action is a way of pleading a claim against the entity of which the defendant is an officer. Kentucky v. Graham, 473 U.S. 159, 165 (1985). While personal capacity suits seek to impose individual liability upon a government officer. Hafer v. Melo, 502 U.S. 21, 25 (1991). Because the plaintiffs seek only injunctive and declaratory relief against Attorney General Shurtleff, it would appear that this action has been brought against the defendant in his official-capacity. "However, the individual defendants named in this action can be sued for damages under § 1983 in their individual capacities. Also, to the extent plaintiff is seeking injunctive relief, he may sue the individual defendants in their official capacities." Roach v. Univ. of Utah, 968 F.Supp. 14446, 1451 (D. Utah 1997).

## I. THIS COURT IS WITHOUT JURISDICTION TO DETERMINE WHETHER A STATE OFFICIAL HAS VIOLATED STATE LAW

Plaintiffs claim that Attorney General Shurtleff's opinions on Utah's firearms laws are erroneous. They ask this Court to determine that the University of Utah has the right to set its own

firearms policies, even if contrary to the laws enacted by the Utah Legislature. They ask this Court to determine what the law of Utah is and to enter an order instructing Utah's Attorney General on how to comply with that law. Complaint at 13-15. This Court is without jurisdiction to do so.

The Eleventh Amendment bars suits against the state and its agencies, no matter what relief is sought. Pennhurst State School Hospital v. Halderman, 465 U.S. 89, 98 (1984); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946). Immunity extends to those governmental entities that are arms of the state. Watson v. Univ. of Utah Medical Ctr., 75 F.3d 569, 577 (10th Cir. 1996). Because of the Eleventh Amendment bar, the United States Supreme Court has held that the states, their agencies, and their employees and officers, when sued in their official capacities, cannot be sued under 42 U.S.C. § 1983. Will v. Michigan, 491 U.S. 58, 71 (1989).

While this immunity of the state extends to its employees when they are sued in their official capacities, an exception is normally made permitting a plaintiff to sue a state official for prospective equitable relief. Ex parte Young, 209 U.S. 123 (1908). But this exception is not absolute.

Under Ex parte Young, 209 U.S. 123, 158-59 (1908), federal courts are empowered "to grant the prospective injunctive relief sought by the plaintiffs if the rules challenged in this case do indeed violate federal law." Earles v. State Bd. of Certified Pub. Accountants of Louisiana, 139 F.3d 1033, 1039 (5th Cir. 1998). But state law claims "are not cognizable in a proceeding under Ex parte Young because state officials continue to be immunized from suit in federal court on alleged violations of state law brought under the federal court's supplemental jurisdiction." Id.

This immunity is meant to prevent federal courts from becoming embroiled in situations like that presented by this lawsuit. Plaintiffs ask this Court to determine what Utah's law is in an alleged

dispute between a state officer and a state agency. Such an intrusion into the affairs of the State of Utah by a federal court is impermissible.

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst State Sch. v. Halderman, 465 U.S. 89, 106 (1984).

This Court is without jurisdiction to consider the plaintiffs' state law claim against Utah's Attorney General Mark L. Shurtleff. "[F]ederal courts have no jurisdiction to entertain a suit that seeks to require the state official to comply with state law – only allegations of violations of federal law are sufficient to come within the Ex parte Young rule." ANR Pipeline Co. v. LaFaver, 150 F.3d 1178, 1188 (10th Cir. 1998). See also Doe v. Bush, 261 F.3d 1037, 1055 (11th Cir. 2001) ("Moreover, to the extent that the defendants were in violation of Florida's own administrative procedures act, federal courts do not have the authority to compel state actors to comply with state law."). For these reasons, defendant asks this Court to dismiss the plaintiffs' state law claims for lack of jurisdiction.

**II. THE PLAINTIFFS ARE WITHOUT AUTHORITY TO BRING A FIRST AND FOURTEENTH AMENDMENT CLAIM AGAINST THE DEFENDANT**

Throughout their complaint, the plaintiffs make it clear that their federal claim against Utah's Attorney General is based on alleged rights "protected under the First and Fourteenth Amendments to the United States Constitution." Complaint at 13, ¶ 39(a). The plaintiffs are the University of Utah, a state created entity, and its president. Neither a state created agency, nor its officer, can sue

the State of Utah or its Attorney General in his official-capacity for an alleged violation of Fourteenth Amendment rights.

> The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned. . . . In none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state.

Trenton v. New Jersey, 262 U.S. 182, 188 (1923) (footnote omitted). Trenton involved claims by the city that the state's actions had violated both the contract clause of the federal constitution and the due process rights of the city under the Fourteenth Amendment. In Williams v. Mayor and City Council of Baltimore, 289 U.S. 36 (1933), two cities sued the receiver of a railroad on the grounds that a Maryland statute, exempting the railroad from city taxes, was invalid as a denial of equal protection under the Fourteenth Amendment and several provisions of Maryland's constitution. In rejecting the cities' federal claims, the court explained that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." 289 U.S. at 40. The same rule applies today.

> It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment. . . .
>
> Despite the sweeping breadth of Justice Cardozo's language, both Williams and Trenton stand only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights.

Branson Sch. Dist. v. Romer, 161 F.3d 619, 628 (10th Cir. 1998). Branson involved an attempt by a school district to sue its state's governor and other state officers for alleged violations of federal law. The Court expressly found that plaintiffs could bring their action only because their claims were **not** predicated on the Fourteenth Amendment. Id. at 629-30.

The same result was reached in Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183 (10th Cir. 1991) (state agency could not sue the state, or a city created by the state, for alleged violations of rights protected by the Fourteenth Amendment). Having determined that the Kaw Housing Authority was an agency of the state of Oklahoma, the court found that it had no rights protected under the Fourteenth Amendment.

> We focus initially on the Authority's standing to sue under section 1983. That provision was enacted to vindicate rights guaranteed under the Fourteenth Amendment, which places limitations on the states in the interest of individual rights. To have standing to sue under section 1983, therefore, the Authority must possess some right guaranteed by the Fourteenth Amendment. Thus, section 1983 does not provide any substantive rights at all but only creates a remedy for the violation of substantive rights guaranteed by the Constitution.

952 F.2d at 1187-88 (citations and footnote omitted).

Relying on this same line of authority, the Eleventh Circuit Court of Appeals has expressly held that a state university lacked standing to assert Fourteenth Amendment claims against its state. Knight v. State of Alabama, 14 F.3d 1534, 1555 (11th Cir. 1994) (university, as creature of the state, could not raise a Fourteenth Amendment claim under Section 1983 against the state); United States of America v. State of Alabama, 791 F.2d 1450, 1455 (11th Cir. 1986) ("ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.").

The fact that Attorney General Mark Shurtleff has been named as a defendant in this action, instead of the State of Utah does not make a difference. In Williams, the fact that the federal court receiver and not the state was the named defendant did not alter the fact that the plaintiff cities did not have a right to challenge their parent state's conduct. In Branson, the court applied this same line of cases to an action where the defendants were state officers from whom injunctive relief was sought.

> We assume that this argument is properly presented in a case where the school districts have not sued the state of Colorado in name but rather have sued several state officials in their official capacities. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989) (holding that a suit against a state official in his representative capacity is considered a suit against the official's office, which "is no different from a suit against the State itself").

Id. at 628. The same result was reached in DeKalb County Sch. Dist. v. Schrenko, 109 F.3d 680, 688-89 (11th Cir. 1997). In DeKalb, the plaintiffs sought to circumvent the fact that the school district could not sue the state and its officers for alleged violations of Fourteenth Amendment rights by including individual school district officers and others as plaintiffs. The court rejected this attempt, finding that because the individual plaintiffs were not seeking any discrete relief, but only the same relief as the agency, that they were only nominally interested in the outcome of the action and that their claims were barred as were the district's.

In this action, a state agency and its president ask this Court to prohibit action on the part of the state's Attorney General based on claims under the Fourteenth Amendment. Such claims are prohibited regardless of the actual named defendant. Because the plaintiffs cannot bring an action

against the state and its officers for alleged violations of the Fourteenth Amendment, the plaintiff's federal claim should be dismissed.

## III. PLAINTIFFS ARE WITHOUT STANDING TO BRING THIS ACTION

The University of Utah and President Machen brought this action against Attorney General Shurtleff. They claim that the defendant has violated their federal rights protected under the First and Fourteenth Amendments to the United States Constitution. But their complaint failed to identify any actions performed by the defendant that have injured them. No facts are alleged showing any causal connection between the conduct of the defendant and any injury. Nor have the plaintiffs pled facts that would show how any relief against defendant Shurtleff would remedy the actions of third persons that are mentioned in the complaint. The plaintiffs have failed to plead a sufficient case or controversy in their complaint.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> The party invoking federal jurisdiction bears the burden of establishing these elements.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and footnote omitted).

The plaintiffs have failed to meet any of these essential elements of standing. Standing is a jurisdictional prerequisite. Phelps v. Hamilton, 122 F.3d 1309, 1316 (10th Cir. 1997). Because the plaintiffs have failed to allege facts in their complaint that would show that this Court has jurisdiction, this matter should be dismissed without prejudice.

**A. Plaintiffs Have Suffered No Injury In Fact**

The University and its president failed to identify any injury in fact in their complaint. No allegation of injury to a First Amendment right was made. At best they identify a difference of opinion with Utah's Attorney General as to what the law of Utah is concerning firearms and to whom that law grants authority to establish the firearms policy of the University of Utah. No factual allegations are made as to any action that the defendant has taken, is taking, or has threatened to take against the plaintiffs. As shown by the statement of undisputed facts, the only conduct alleged against the defendant is that he holds certain opinions and beliefs as to what the law of the State of Utah is. Such claims do not meet the requirement of standing that the plaintiff have suffered the invasion of a legally-protected interest and that the injury be actual and not hypothetical. The beliefs and opinions of the defendant have not injured the plaintiffs in any manner that would meet the first element of the test for standing. The fact that the parties may have a difference of opinion over state law in no way creates a concrete and particularized injury in fact.

A plaintiff must show "a real and immediate threat that she will be prosecuted under this statute in the future." Faustin v. City and County of Denver, Colorado, 268 F.3d 942, 948 (10th Cir. 2001). Not only have the plaintiffs failed to show such a real and immediate threat that their federal rights will be violated in the future, they have failed to allege any prior violation. Having made only allegations concerning the defendant's beliefs, no jurisdictionally required facts have been alleged to show any injury in fact.

This is especially so where the plaintiffs claim is that their First Amendment rights have been injured. No claim is made that the plaintiffs have been precluded from speaking freely on any issue.

No claim is made that they have had any restrictions put upon them by the defendant as to when or where they can speak or upon what topic they can speak. Nor has any allegation been made that the plaintiffs' rights to speak out has been "chilled" by any action of the defendant. Instead, plaintiffs have combined the question of whether the law of Utah is as they desire it to be with the separate question of whether their First Amendment rights have been violated.

In Skrzypczak v. Kauger, 92 F.3d 1050, 1053 (10th Cir. 1996), the court pointed out that the right to free speech was not implicated by a state court's decision not to permit the plaintiff's initiative petition to appear on the ballot.

> Skrzypczak mistakenly conflates her legally-protected interest in free speech with her personal desire to have SQ 642 on the ballot. In removing SQ 642 from the ballot, the Oklahoma Supreme Court has not prevented Skrzypczak from speaking on any subject. She is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue. Her right to free speech in no way depends on the presence of SQ 642 on the ballot. Moreover, she cites no law, and we find none, establishing a right to have a particular proposition on the ballot. Because she has failed to assert a legally-cognizable interest, we hold that Skrzypczak lacks standing to assert her claim.

Regardless of the outcome of the state law question concerning the validity of the University's firearms policy, no injury can be shown to the plaintiffs' alleged First Amendment rights. **B. No Causal Connection Has Been Alleged Between the Defendant and Any Injury**

The second element of the test for standing requires that the alleged injury be causally related to the defendant and not to the independent actions of third parties not before the court. The plaintiffs have failed to meet this element of the test as well. As shown by the undisputed statement

of facts, the conduct that the plaintiffs seek to stop has not been done or caused by the defendant but by third parties who are not before the Court.

The plaintiffs are unhappy with the conduct of the Utah Legislature and certain students and employees of the University of Utah. No causal connection has been alleged between Attorney General Shurtleff and the fact that "certain members of the Utah Legislature threatened to reduce the University's administrative budget by up to 50 percent" (Complaint at 2, ¶ 3; 9 ¶ 27(b)) or that the Legislature has expressed its belief that the University of Utah's internal firearms policy is invalid. Complaint at 8-9 ¶ 27(a). The only action pled against Attorney General Shurtleff is that he issued a non-binding opinion to the leadership of the Utah Legislature. Such conduct is not causally connected to the decisions and actions of the Utah Legislature, an independent branch of state government over which the defendant has no authority.

The same is true concerning the plaintiffs' concerns that students or employees of the University may challenge, or ignore, its firearms policies. Again, no claim is made that the defendant has control or authority over these unnamed third persons. Nor is there any allegation of what responsibility the defendant has for their alleged actions or threats of action. Defendant submits that these complaints of third person conduct cannot be "fairly traced" to the defendant. Lujan, 504 U.S. at 560.

The only conduct alleged on the part of the defendant is that he holds certain beliefs on what Utah law is and that he issued an opinion to the leadership of the Utah Legislature. The fact that the defendant has opinions on state law does not create a causal connection with the independent actions of third persons. If the plaintiffs believe that the Legislature or certain students or employees have

violated their rights or state law, these persons can be sued for their alleged wrongdoing. But no standing can be shown based solely on a claim that Attorney General Shurtleff's opinion as to what the law of Utah is somehow caused others to have similar opinions. Indeed, under the plaintiffs' theory, they should have sued Utah's Office of Legislative Counsel because the only claim against the defendant is that he "referred approvingly" to its Formal Opinion No. 98-01 and stated that he "agreed with that opinion" which stated that the University of Utah's firearms policies were in violation of Utah law. Complaint at 8, ¶ 25.

**C. The Plaintiffs' "Injury" Cannot Be Redressed By a Judgment Against the Defendant**

As stated above, the real "injury" claimed by the plaintiffs has nothing to do with the actions, or threatened actions, of Attorney General Mark Shurtleff. Instead, the plaintiffs complain of the conduct of the Utah Legislature and unnamed students and employees of the University of Utah. No relief entered against the defendant would remedy the "injuries" that the plaintiffs allege have or will be inflicted upon them by third persons who are not before the Court.

A judgment against Attorney General Shurtleff would not prevent students or employees from bringing independent challenges to the validity of the University's firearms policies. No judgment entered in this action would stop students or employees from ignoring these same policies. Nor could any judgment prevent the Utah Legislature from setting whatever level of funding that it desired for the University. Finally, no judgment against the defendant would effect the authority of the Utah Legislature to enact whatever state firearms laws that they determined were appropriate.

The plaintiffs have failed to allege facts sufficient to meet any one of the three elements of standing, let alone all three. For this reason this Court should dismiss this matter for lack of standing.

## IV. NO AFFIRMATIVE LINK BETWEEN DEFENDANT AND THE ALLEGED WRONGFUL ACTS OF OTHERS HAS BEEN PLED

Plaintiffs claim that various third parties, not before this Court, have either committed or threatened to commit wrongful acts against the plaintiffs related to the University of Utah's firearms policy. But none of their factual allegations show any action on the part of Attorney General Shurtleff, other than holding a belief as to what the law of Utah is. There is no claim that he has threatened to violate the University's firearms policy, to sue the University, or to take any action at all against these plaintiffs.

The Tenth Circuit Court of Appeals has made it clear that respondeat superior cannot be the basis of liability under 42 U.S.C. § 1983. Smith v. Maschner, 899 F.2d 940, 950 (10th Cir. 1990); McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979). The plaintiffs have a duty to show a causal link between a defendant and the alleged wrongdoing. Rizzo v. Goode, 423 U.S. 362, 380-81 (1974). Each civil rights defendant must be shown to have been affirmatively linked to the conduct that allegedly violated the rights of the plaintiff. The plaintiffs have failed to allege any such connection between their claimed violations and defendant Shurtleff.

The plaintiffs do not identify any conduct on the part of the defendant that satisfies this duty in their complaint. General Shurtleff is neither the employer nor the supervisor of the legislators, students and university employees who are alleged to have taken, or threatened, actions against the

plaintiffs. While Section 1983 recognizes a very limited duty on the part of a supervisor to prevent his or her subordinates from violating the rights of another, plaintiffs have failed to even allege what duty Attorney General Shurtleff had to control the acts of others. A plaintiff has a high burden to impose liability upon a supervisor for failing to prevent a subordinate from violating a plaintiff's constitutional rights. See, Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988); Jojola v. Chavez, 55 F.3d 488, 490 (10th Cir. 1995); Woodward v. City of Worland, 977 F.2d 1392, 1399 (10th Cir. 1992). A plaintiff must allege specific facts to establish that the conduct of the defendant must have been "so reckless or grossly negligent that future misconduct [was] almost inevitable." Meade, 841 F.2d at 1528. Defendant submits that the fact his opinion on Utah's law concerning firearms may be different from that held by the plaintiffs does not create the necessary affirmative link.

Where, as here, the defendant is not even a supervisor, plaintiffs have clearly failed to identify specific facts sufficient to establish his liability for the alleged actions of various third party students and university employees to whom no relationship is alleged. The same is true of Utah's Legislature. No explanation is made as to what authority or control the defendant, an officer of the executive branch of Utah's government, has over the actions of a separate, independent branch of that government.

For this reason, the plaintiffs' action against Attorney General Shurtleff should be dismissed.

## V. THE UNIVERSITY OF UTAH HAS NO FIRST AMENDMENT RIGHT THAT WOULD PREVENT THE STATE OF UTAH FROM CONTROLLING ITS FIREARMS POLICY

Plaintiffs allege that any legislative control over the University's firearms policy would somehow violate their rights under the First Amendment. Plaintiffs fail to state a claim because

government, as opposed to private expression, can control its own expression and that of its agents without violating First Amendment rights.

> The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents. Consequently, the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen.

Serra v. United States Gen. Serv. Admin., 847 F.2d 1045, 1048-49 (2nd Cir. 1988) (citations and internal quotations omitted); see also Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1038 (5th Cir. 1982) (First Amendment protects private expression, not governmental expression and nothing in the amendment precludes the government from controlling its own expression and that of its agents). When the government speaks, it can make viewpoint-based decisions, even funding decisions based upon content of speech, without violating the First Amendment. Wells v. City and County of Denver, 257 F.3d 1132, 1139 (10th Cir. 2001) (government within its rights to control content of its own speech).

The rights guaranteed by the Fourteenth Amendment are private rights. They are limitations on the states in the interest of individuals. Housing Auth. of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183, 1188 (10th Cir. 1991). As the United States Supreme Court stated In Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933), "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." The University of Utah does not have either a First Amendment or a Fourteenth Amendment right to challenge the State of Utah's decisions as to what speech or conduct will be authorized by the State

of Utah. As a state agency it cannot challenge the decision of the state to control its conduct in this manner.

The plaintiffs have failed to state a claim for relief under the federal constitution and their federal claims should therefore be dismissed with prejudice.

## VI. UNDER UTAH LAW, THE UNIVERSITY OF UTAH IS NEITHER SELF-GOVERNING NOR AUTONOMOUS

The University of Utah, as a matter of state law, claims to be autonomous and self-governing based upon its reading of Utah Const. art. X, § 4. As shown by the undisputed facts, this reading of Utah's Constitution is erroneous. At the time of the enactment of Utah's constitution, the University of Utah was expressly "subject to the laws of Utah, from time to time enacted, relating to its purposes and government." 1892 Utah Laws 8. Far from granting any form of autonomy to the University, Utah's Constitution simply continued the rights and privileges already provided by statute. This included the continuing requirement that the University be subject to the laws of Utah from time to time enacted.

Defendant submits that this issue has already been decided against the plaintiffs, several times, by the Utah Supreme Court. Because this is an issue of state law, this Court is bound by the decisions of Utah's highest court as to what the law of Utah is. Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1280 (10th Cir. 2000) ("it is not our place to expand Utah state law beyond the bounds set by the Utah Supreme Court"); Coletti v. Cudd Pressure Control, 165 F.3d 767, 775 (10th Cir. 1999) (trial court has duty to apply the law of the jurisdiction and if its law is silent to rule as it believes the supreme court of the state would rule).

As early as 1909, the Utah Supreme Court rejected the idea that the University of Utah was an independent entity outside the control of the state. In State v. Candland, 36 Utah 406, 104 P. 285, 293 (1909), the court held that the indebtedness of the University of Utah was also the debt of the State of Utah.

> While it is true that the university is a corporation and thus constitutes a legal entity with a limited capacity, yet, when all of the provisions of law, which in some way relate to and affect the government of the university are considered and construed together, it is made very clear that the corporation designated the University of Utah was created and exists for the sole purpose of more conveniently governing and conducting the educational institution called the "University." The university is clearly a state institution, and is so treated, since the members constituting its governing board are all appointed by the Governor with the consent of the senate, and the board regularly reports to the Governor. Moreover, the corporation holds all the property in trust merely. In fact the property belongs to the state of Utah. We think no one will seriously contend that the corporation styled the "University of Utah" has the power or authority, without the consent of the state of Utah, to dispose of any property.

In Spence v. Utah State Agr. College, 119 Utah 104, 225 P.2 18 (1950) (legislature had authority to alter controlling board of agricultural college), the court upheld the ongoing authority of the legislature to control both the state agricultural college and the University of Utah.

> A doctrine firmly established in the laws of most jurisdictions is that a state constitution is in no manner a grant of power, it operates solely as a limitation on the legislature, and an act of that body is legal when the constitution contains no prohibition against it. This state is committed to that doctrine.

225 P.2d at 23. The court expressly rejected the idea that the applicable section of Utah's constitution had created a constitutional autonomous corporation.

Most significantly, the Utah Supreme Court expressly rejected the very autonomy now claimed by the University of Utah in University of Utah v. Board of Examiners of State of Utah, 4

Utah 2d 408, 295 P.2d 348 (1956). This action dealt with the University's claim that it was fiscally, and otherwise, independent of any control by the Legislature or other boards, commissions or officers of the State of Utah as a constitutionally created corporation. In rejecting this argument, the court explained:

> It is inconceivable that the framers of the Constitution in light of the provisions of Sections 1, 5 and 7 of Article X, and the provision as to debt limitations, intended to place the University above the only controls available to the people of this State as to the property, management and government of the University. We are unable to reconcile respondent's position that the University has a blank check as to all its funds with no pre-audit and no restraint under the provisions of the Constitution requiring the State to safely invest and hold the dedicated funds and making the State guarantor of the public school funds against loss or diversion. To hold that respondent has free and uncontrolled custody and use of its property and funds, while making the State guarantee said funds against loss or diversion is inconceivable. We believe that the framers of the Constitution intended no such result.
>
> Appellants and respondent agree that the interpretation which we put on Article X, Section 4 will determine the other questions presented. It has not been urged by respondent that if the University is subject to legislative control that any of the enactments complained of are invalid. Respondent's objection is that the Legislature had no power to confer on the Boards, Commissions and Officers the authority to supervise and control the University. Since no complaint is made against the defendants named, except that the duties being performed by them are in violation of respondent's constitutional rights because the Legislature could not legally invest said defendant with authority to infringe upon the rights secured by the Constitution, it must follow that the objections of respondent as to the acts complained of must fall by reason of the conclusion reached herein; that the University is a public corporation not above the power of the Legislature to control, and is subject to the laws of this State from time to time enacted relating to its purposes and government.

295 P.2d at 370-71. Indeed, the Utah Supreme Court determined that "[t]he entire thought of the convention in respect to the University and Agricultural College was on the question of uniting them or leaving them separate, and on the question of location. . . . Nowhere in the proceedings can an

expression of intent be found that the Legislature should forever be prohibited from acting in any matters dealing with the purposes and government of the University excepts its establishment and location." Id. at 368.

In First Equity Corporation of Florida v. Utah State University, 544 P.2d 887 (Utah 1975), the court applied the holding of Board of Examiners to the agricultural college (now known as Utah State University). "USU is a corporation and thus constitutes a legal entity with limited capacity. It was created and exists for the sole purpose of more conveniently governing and conducting the educational institution. It is a state institution, a public corporation not above the power of the Legislature to control and is subject to the laws of this state from time to time enacted relating to its purposes and government." 544 P.2d at 889. In Petty v. Utah State Board of Regents, 595 P.2d 1299, 1300-1 (Utah 1979) the court again relied upon Board of Examiners for the proposition that the University of Utah was subject "to the general legislative control and budgetary supervision as are other departments of state government."

More recently, this Court relied upon Board of Examiners in determining that the University of Utah was an arm of the state for Eleventh Amendment immunity purposes. Pharmaceutical and Diagnostic Services, Inc. v. University of Utah, 801 F.Supp. 508, 512 (D. Utah 1990) ("[t]hus, the state's highest court has indicated in unequivocal terms that the University acts as a state-created, state-financed entity with a severely constricted degree of autonomy.") (footnote omitted). It is interesting to note that in reaching this decision, the court rejected the plaintiff's reliance on a Utah Attorney General Opinion that had opined that the University was not an arm of the state. Id. at 512 n.7 ("[t]his court is unwilling to give greater credence to the Attorney General's non-binding opinion

than to Utah statutory structure and the Utah Supreme Court's construction of that structure"). The Tenth Circuit has also followed Board of Examiners in determining that the "University is not autonomous but rather is a state-controlled entity." Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569, 575 (10th Cir. 1996).

The 1986 amendment to section four did not create any new rights or powers for the University of Utah. Instead it only confirmed those "originally established or recognized by the constitution." Utah Const. art. X, § 4. The caselaw clearly demonstrates that Utah's constitution has never provided the University of Utah with the autonomy it seeks. Both Utah's state courts and the federal courts agree that the University of Utah is subject to the control of Utah's Legislature. It is not a constitutionally created autonomous entity. Instead, the University is subject to the laws enacted from time to time by Utah's Legislature and to the controls and constraints placed upon it. The University has no right to create policy contrary to legislative enactments and its claims to such authority should be dismissed with prejudice.

## VII. THE UNIVERSITY OF UTAH'S FIREARMS' POLICIES ARE CONTRARY TO UTAH LAW

Under Utah law, plenary power in determining what the law should be is vested in the state's legislature. "The Utah Constitution is not one of grant, but one of limitation. The state having thus committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution, it has plenary power for all purposes of civil government." Utah Sch. Bd. Assoc. v. Utah State Bd. of Educ., 2001 UT 2, ¶11, 17 P.3d 1125 (internal quotations omitted). In the area of firearms, the legislature's power has not been limited

by the constitution. "[N]othing herein shall prevent the legislature from defining the lawful use of arms." Utah Const. art. I, § 6.

Pursuant to its lawmaking authority, the Utah Legislature has seen fit to keep for itself the right to regulate firearms. "[A]ll authority to regulate firearms is reserved to the state through the Legislature." Utah Code Ann. § 78-27-64(1) (Supp. 2001). In the interest of uniformity, only the legislature has been authorized to regulate firearms.

> (1) The individual right to keep and bear arms being a constitutionally protected right, the Legislature finds the need to provide uniform laws throughout the state. Except as specifically provided by state law, a citizen of the United States or a lawfully admitted alien shall not be:
> (a) prohibited from owning, possessing, purchasing, selling, transferring, transporting, or keeping any firearm at his place of residence, property, business, or in any vehicle lawfully in his possession or lawfully under his control; or
> (b) required to have a permit or license to purchase, own, possess, transport, or keep a firearm.
> (2) This part is uniformly applicable throughout this state and in all its political subdivisions and municipalities. All authority to regulate firearms shall be reserved to the state except where the Legislature specifically delegates responsibility to local authorities or state entities. Unless specifically authorized by the Legislature by statute, a local authority or state entity may not enact or enforce any ordinance, regulation, or rule pertaining to firearms

Utah Code Ann. § 76-10-500 (1999).

Attorney General Shurtleff has been sued because of his legal opinion that the University of Utah's firearms policies are invalid. Absent an express grant of authority from the Utah State Legislature, the University of Utah is without the power to regulate firearms. Any policy it enacts or seeks to enforce on this issue is invalid and without effect. Only the uniformly applicable laws enacted by the Utah State Legislature regulate if, when or how firearms may be introduced onto the

campus of the University of Utah. For this reason the state law claims of the plaintiffs fail on the merits and should be dismissed with prejudice.

## CONCLUSION

For the reasons stated above, defendant Mark Shurtleff, Attorney General of the State of Utah asks this Court to dismiss this action for lack of jurisdiction. In the alternative, defendant asks that this matter be dismissed because the plaintiffs have failed to state a claim upon which relief can be granted.

DATED this _____ day of June, 2002.

_____
BRENT A. BURNETT
Attorney for Defendant Mark L. Shurtleff

## CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 2002, a true, correct and complete copy of the foregoing was delivered to the following attorneys as indicated below:

Alan L. Sullivan
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_____ U.S. Mail
_____ Hand Delivered
_____ Overnight
_____ Facsimile
_____ No Service

_____